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In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-612

KURT VON POPPENHEIM,

Petitioner,

v.

PORTLAND BOXING & WRESTLING COMMISSION; JACK A. BATTALIA, NICK SCKAVONE, JOHN D. WELCH, EDWIN FITZPATRICK & ARNOLD C. HARRIS, individually and as members of the Portland Boxing & Wrestling Commission;

NATIONAL WRESTLING ALLIANCE, an Iowa Membership Corporation; DON OWEN, individually and as resident agent-member of the National Wrestling Alliance;

MOUNT HOOD RADIO & TELEVISION BROADCASTING CORPORATION, a Delaware corporation, NATIONAL WRESTLING ASSOCIATION OF AMERICA, INCORPORATED, and DON OWEN SPORTS, INC., an Oregon corporation,

Respondents.

BRIEF FOR RESPONDENT MOUNT HOOD RADIO & TELEVISION BROADCASTING CORPORATION IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Judge, United States District Court for Oregon, is unreported but is set

forth in the Petition as Apx. B at p. 82. The opinion of the Court of Appeals is reported at 443 F.2d 1047 and is set forth in the Petition as Apx. C at p. 85.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Does the petitioner have a case calling for the grant of writ of certiorari under Rule 19 of this Court; petitioner's case having arisen upon a dismissal under the Fed. R. Civ. P. 41(b) for failure to comply with an order of court. The order of court directed the petitioner to set forth his witnesses, their expected testimony, the conspirators, and their role in the conspiracy. The court's order was issued after discovery procedure had failed.

Should the petitioner be permitted to raise issues which were not raised in the court below?

RULE INVOLVED

Fed. R. Civ. P. 41(b).

STATEMENT OF THE CASE

This respondent adopts the Statement of the Case as set forth in the brief of the Portland Boxing & Wrestling Commission.

ARGUMENT

The Court Below Decided Correctly

In upholding the District Court Judge, the Ninth Circuit Court of Appeals found that the petitioner had been given every opportunity to develop his case and prepare it for trial. The trial judge was exceedingly patient and indulgent. Rule 41(b) can be a harsh rule and should be used sparingly. The Ninth Circuit Court of Appeals found that the petitioner's actions more than merited the application of the rule.

In the case of Mount Hood Radio & Television Broadcasting Corporation, this respondent made a record of full cooperation with the petitioner, but this respondent, on the other hand, was totally frustrated in its efforts to ascertain the facts which constituted the basis of the petitioner's complaint. In the deposition of the plaintiff, Kurt Von Poppenheim, his answers indicated that he did not have any evidence to connect Mount Hood to the alleged conspiracy. See p. 102-108, Deposition of Plaintiff, Kurt Von Poppenheim. In answer to interrogatories, the plaintiff stated that he did not have any evidence connecting Defendant Mount Hood with the alleged conspiracy (Tr. 117-132). In response to the court's order of April 24, 1967 (Tr. 699-707) to set forth the conspiracy, Mount Hood was not even mentioned as a conspirator (Tr. 708-711). In the course of this proceeding, the plaintiff, in an attempt to connect television broadcasting with the alleged conspiracy,

has mentioned television stations other than this defendant (Tr. 784, 785-797).

Mount Hood Radio & Television Broadcasting Corporation did cooperate with the plaintiff in every way possible to assist the plaintiff in his discovery, including answering a set of interrogatories after the District Court entered an order relieving the defendants from any further necessity to answer interrogatories (Tr. of hearing on March 25, 1968, at 89-92; Tr. 752-765).

Certiorari Is Not Warranted Under Rule 19

The petitioner has included items in his Petition which were not raised in the court below and has misstated the record. This respondent contends that this is not a proper case for review by the United States Supreme Court. The elements found in Rule 19, United States Supreme Court Rules, are not found in this case. The Petition does not claim a conflict between circuits, nor does it claim an important state or territorial question decided in conflict with state or territorial law. The Petition does not claim an important question which has heretofore not been decided by this Court. This Court has, in fact, dealt with the issues. See *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962).

There is not a contention that the Ninth Circuit Court of Appeals has decided this case contrary to a decision of the United States Supreme Court, nor does the Petition claim that there is a need for the

Court to exercise its supervisory powers over the circuit courts.

Defendant's Rights to Due Process

In sifting through the fact, fiction and fantasy found in the Petition, one finds on p. 3 of his Petition the heart of the petitioner's contention; namely, that he ought to have been permitted to go to trial regardless of the state of the record, and that he should have been permitted to prolong and continue his discovery until such time as he was able, if ever, to find sufficient facts to support his ever shifting claim. As in a criminal case, the defendants in an antitrust action have some rights to a speedy trial and due process. When there is a failure to prosecute and a failure to cooperate with the court in getting the record into shape for trial, there ought to be some relief for the defendants under Rule 41(b). Petitioner imposed an onerous burden on this defendant, both in cost and time. The record disclosed early in the case that petitioner had no basis for his claim against Mount Hood Radio & Television Broadcasting Corporation. He ignored the fact that the sponsor controls the show (Tr. 752-765), and that several different stations were involved in televising wrestling in the City of Portland, and he ignored the fact that there was no relationship between Mount Hood Radio & Television Broadcasting Corporation and the Boxing & Wrestling Commission. He ignored the fact that wrestling in Portland was a show which was put on by a promoter and the television station

broadcasting that show was paid for that service by a sponsor; nothing more, nothing less. This respondent cooperated fully with the petitioner and gave him every opportunity to develop facts to substantiate his claim. He was totally unable to do so.

CONCLUSION

This respondent respectfully contends that the District Judge correctly applied Rule 41(b), Fed. R. Civ. P., and that the Ninth Circuit Court of Appeals correctly affirmed the decision of the District Judge. As in a criminal trial where a defendant has a right to a speedy trial, this defendant should be afforded some protection from protracted and frivolous litigation, where the plaintiff refuses to disclose his case and present justiciable issues. This defendant respectfully contends that there is no issue raised in this case which would compel this Court under the guidelines of Rule 19 to grant a writ of certiorari. Justice was done below. There should be an end to litigation in this case.

Respectfully submitted,

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